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No. 00-844

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES GILBERT GIBBS, *et al*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DEFENDERS OF WILDLIFE

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QUESTION PRESENTED

Whether the Constitution authorizes the federal government to advance the recovery of the only wild population of endangered red wolves by regulating the "taking" of such wolves.

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INTRODUCTION

The petitioners offer no legitimate reason for this Court to review the Fourth Circuit's decision sustaining a regulation promulgated under the Endangered Species Act ("ESA") as a legitimate exercise of the federal commerce power. The petition cites a need for this Court to reconcile disagreements in the lower courts, despite a uniform body of federal case law that fully accords with the decision below. The petition also calls for this Court to enforce the principles of its recent Commerce Clause jurisprudence, despite the faithful application of those principles by a court that cannot credibly be depicted as hostile to federalism concerns. In fact, no case in any federal court—including this Court's recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), No. 99-1178, 2001 WL 15333 (U.S. Jan. 9, 2001)—presents any inconsistency with the holding or reasoning of the Fourth Circuit's decision. The Petition for a Writ of Certiorari should be denied.

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS, AND REGULATIONS INVOLVED

Constitutional Provisions:

Article I, Section 8 of the United States Constitution provides in Clauses 3 and 18 that:

> The Congress shall have Power ...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; [and]
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this

> Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 2, Clause 2 of the United States Constitution provides:

> The President ... shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ....

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Treaty Provisions:

The 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, United States-Other American Republics, 56 Stat. 1354, T.S. No. 981 (effective May 1, 1942), provides, in pertinent part, as follows:

> The Governments of the American Republics, wishing to protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control; and
>
> * * *
>
> Wishing to conclude a convention on the protection of nature and the preservation of flora and fauna to

effectuate the foregoing purposes have agreed upon the following Articles:

* * *

Article V

1. The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves ....

Regulations:

The Petitioners' Appendix does not correctly reproduce the federal regulation at issue, 50 C.F.R. § 17.84(c). The regulation is correctly reproduced in the Appendix, *infra*, pages 1a-5a.

STATEMENT OF THE CASE

A. The Endangered Species Act

The Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, requires protection of wildlife species determined to be endangered or threatened with extinction. Among the stated purposes of the ESA is "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b); *see also id.* § 1536(a)(1) (requiring all federal agencies to "carry[] out programs for the conservation of endangered species and threatened species"). To "conserve" a species under the ESA means more than merely preventing its extinction. It means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," *id.* § 1532(3)—*i.e.*, to

recover endangered and threatened species from their imperiled condition.

Among the chief measures set forth in the ESA to achieve this goal is a general prohibition on "taking" any endangered species within the United States. *See id.* § 1538 (a)(1)(B). Under the ESA, to "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

In 1982, Congress added a new conservation provision to the ESA. Although the ESA previously had authorized "transplantation" of endangered and threatened species to promote their recovery, *id.* § 1532(3), Congress enacted a new section 10(j) to provide expressly for the release of "experimental populations" of endangered and threatened species into their historic habitats. 16 U.S.C. § 1539(j). Congress crafted section 10(j) "[t]o encourage efforts to establish such experimental populations when the conservation needs of a species would be served by doing so." H.R. Rep. No. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

Section 10(j) provides for flexible tailoring of the ESA's management requirements. Most pertinent to this case, section 10(j) provides discretion for the U.S. Fish and Wildlife Service ("FWS") (which administers the ESA with respect to terrestrial species) to issue "such regulations as [it] deems necessary and advisable to provide for the conservation" of any experimental population. 16 U.S.C. § 1533(d); *see also id.* § 1539(j)(2)(C). Among other things, such regulations may relax the ESA's general taking prohibition by permitting takings in specified circumstances. Congress intended section 10(j) to provide a pragmatic means of accomplishing species reintroductions that might otherwise be "frustrated by public opposition." H.R. Rep. No. 97-567, at 34, *reprinted in* 1982 U.S.C.C.A.N. at 2834. It specifically intended section 10(j)'s flexible measures to

facilitate "the release of experimental populations of predators, such as red wolves." *Id.*

B. The Red Wolf Reintroduction Program

The red wolf once ranged throughout the southeastern United States. Pet. App. 4a. However, the drainage of the vast wetlands that once provided habitat for the wolves, coupled with extensive federal, state, and private predator-control efforts, reduced the species to a small remnant population. *See* Pet. App. 5a. Accordingly, the FWS in 1967 listed the red wolf as an endangered species. *See* 50 C.F.R. § 17.11(h). By the mid-1970s, the remaining red wolves were few in number, in poor physical condition, and threatened by inbreeding. *See* Pet. App. 5a. The FWS elected to capture the last red wolves and place them in a captive breeding program with the expectation of one day reintroducing the species to the wild. *See id.*

The FWS's reintroduction plan came to fruition in 1986 with the release of red wolves into the 120,000-acre Alligator River National Wildlife Refuge in northeast North Carolina. *See id.* In conjunction with the release, the FWS promulgated a rule, 50 C.F.R. § 17.84(c), governing the "taking" of red wolves in the experimental population by members of the public. This "red wolf regulation" prohibits only the intentional or willful killing of a red wolf. *See id.* § 17.84(c)(4)(i). Moreover, it permits private landowners to kill a red wolf if they find it on their property in the act of killing pets or livestock, *see id.* § 17.84(c)(4)(iii), or if agency efforts to recapture the wolf have been abandoned and an appropriate FWS official approves the taking. *See id.* § 17.84(c)(4)(v). The regulation also permits landowners to "harass" red wolves from their property by non-injurious means. *See id.* § 17.84(c)(4)(iv).

The reintroduction quickly proved successful. The wolves reproduced in the wild and grew in number, and the

FWS expanded the program to include the nearby 112,000-acre Pocosin Lakes National Wildlife Refuge. *See* Pet. App. 5a. As of 1998, the FWS reported that 75 red wolves were living in the wild. *See id.* The wolves have occupied both the refuges and surrounding private lands, and the owners of approximately 200,000 acres of private land near the refuges have agreed with the FWS to permit the wolves to range on their property. *See id.*; C.A. App. 342-45.

Contrary to the petitioners' assertions, the reintroduction of red wolves has not generated any "dangerous conflict between wolves and humans." Pet. 4. Although petitioners cite their purported need to "protect[] themselves ... from the depredations of wild wolves," Pet. 2, they have been unable to identify a single incident in which wild wolves (much less wild red wolves) have attacked a person anywhere in the United States. *See* C.A. App. 1396.[1] As for petitioner Mann's assertion that his "small son was threatened by a red wolf," Pet. 4, the record on this point—which consists solely of petitioners' uncorroborated account—establishes merely that a red wolf "approached" Mr. Mann's son while the family was hunting with a rifle, then fled but "paused" to look back before disappearing into the brush. C.A. App. 1395. Nor have the wolves taken a significant toll on private property. To date, confirmed losses have amounted to one dog, some goats, and a rooster over the entire life of the reintroduction program, all of which were fully compensated by the FWS. *See* C.A. App. 372-75.

As the FWS has observed, "the reintroduction experiment was successful and generated benefits that extended beyond the immediate preservation of red wolves to positively affect local citizens and communities, larger conservation efforts, and other imperiled species." 58 Fed.

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[1] Of course, the FWS's regulation would authorize a taking in the unlikely event that a red wolf were to threaten a human being. *See* 50 C.F.R. § 17.84(c)(4)(i), (ii).

Reg. 62,086, 62,087 (1993). The wolves are the subject of wildlife-related study and tourism that has drawn visitors to eastern North Carolina from around the world. *See* Pet. App. 17a-18a; C.A. App. 840, 1261-1301. Further, as the first-ever reintroduction into its former range of a predator species that was officially declared extinct in the wild, the red wolf reintroduction has served to guide later reintroductions of other imperiled wildlife species around the country, including the California condor, black-footed ferret, Mexican wolf, Rocky Mountain wolf, and eastern cougar. *See* C.A. App. 170, 603.

C. The Present Litigation

Petitioners sued the defendants in the Eastern District of North Carolina on March 3, 1997, claiming that the red wolf regulation exceeds the federal government's constitutional powers. *See* Pet. App. 58a-59a. On October 27, 1997, the district court granted a motion by Defenders of Wildlife to intervene as defendants. *See id.* On December 21, 1998, the district court granted the defendants' motions for summary judgment. *See id.* 58a-69a. The court held that the red wolf regulation was within the federal government's authority under the Commerce Clause. *See id.* 64a-69a.

The court of appeals affirmed. *See id.* 1a-55a. Chief Judge Wilkinson's majority opinion concluded that the activities regulated by the red wolf regulation have a "substantial relation to interstate commerce" and constitute "economic activity" within the meaning of this Court's recent Commerce Clause jurisprudence. *See id.* 14a-15a (citing *United States v. Morrison*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995)). The majority cited ongoing interstate tourism and scientific research focused upon the red wolf population, the potential for a renewed trade in wolf-related products such as fur pelts, and the economic motivation of petitioners and others to take red wolves for the purpose of protecting agricultural

products and livestock. *See* Pet. App. 17a-23a. The majority concluded that "[t]he protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities." *Id.* 26a.

The majority held that the red wolf regulation "is also an integral part of the overall federal scheme to protect, preserve, and rehabilitate endangered species, thereby conserving valuable wildlife resources important to the welfare of our country." *Id.* 14a. The majority recognized this Court's admonition that "'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence.'" *Id.* 27a-28a (quoting *Lopez*, 514 U.S. at 558). Accordingly, it reasoned that "the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species." *Id.* 28a. The latter, the majority concluded, "has an effect on many dimensions of commerce between the states." *Id.*

Finally, Chief Judge Wilkinson wrote that upholding the red wolf regulation "is consistent with the 'first principles' of a Constitution that establishes a federal government of enumerated powers." *Id.* 30a (citing *Lopez*, 514 U.S. at 552). The majority reasoned that, "[g]iven the history of federal regulation over wildlife and related environmental concerns, it is hard to imagine how this anti-taking regulation trespasses impermissibly upon traditional state functions—either control over wildlife or local land use." *Id.* 33a. It concluded that "invalidating this regulation would deal a damaging blow to the essential place of the enumerated powers in preserving scarce resources of all sorts for the common good." *Id.* 40a.

Judge Luttig dissented. *See id.* 46a-55a. He asserted that taking of red wolves "has no current economic character" and "no foreseeable economic character at all." *Id.* 53a (Luttig, J., dissenting). He acknowledged, however, that the taking of red wolves is "an activity that Congress could plainly regulate under its spending power and under its power over federal lands, regardless." *Id.*

The court of appeals denied rehearing en banc on August 25, 2000. No member of the court requested a poll on the petition. *See id.* 56a-57a.

REASONS THE PETITION SHOULD BE DENIED

I.

THE FOURTH CIRCUIT'S RULING REVEALS NO NEED FOR GUIDANCE FROM THIS COURT

The petitioners assert that "the lower courts are badly torn on the scope of federal power to regulate noncommercial activities affecting wildlife" and that "this conflict [sic] warrants this Court's immediate attention." Pet. 21. Contrary to the petitioners' assertion, however, Chief Judge Wilkinson's opinion in this case reflects no "conflict" among the lower courts and bears none of the hallmarks of a decision that merits this Court's "immediate attention."

Despite their attempt to conjure up the impression that the lower courts are in disarray, the petitioners are forced to concede that *every* federal court that has addressed the constitutionality of the Endangered Species Act or regulations promulgated under it (or of similar federal legislation such as the Eagle Protection Act) has agreed that the Commerce Clause authorizes such federal protection of wildlife. *See* Pet. 20-21 (citing *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981);

United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997), *appeal pending*, No. 00-5143 (D.C. Cir.)). By petitioners' own concession, the most common indicator of a need for intervention by this Court—a division among the Circuits on an important issue of federal law—is completely absent here.

Lacking a conflict among the Circuits on which to hang their petition, the petitioners instead contend that purported disagreements among some federal *judges* warrant review by this Court. The petitioners rely heavily on the differences between the opinions of the two judges in the majority in the D.C. Circuit's ruling in *National Association of Home Builders v. Babbitt*, *supra*, which upheld the constitutionality of protecting an insect called the "Delhi Sands Flower-Loving Fly" under the Endangered Species Act. *See* Pet. 21-22. More important than any theoretical differences between the opinions of Judges Wald and Henderson in that case, however, was their agreement with each other—and with every other extant federal judicial decision—that the Act falls comfortably within the bounds of the Commerce Power.

Moreover, the petition neglects to mention that this Court already had an opportunity to consider whether the slightly differing approaches of Judges Wald and Henderson merited further review when it considered and denied the petition for a writ of certiorari in the *Home Builders* case. *National Ass'n of Home Builders v. Babbitt*, 524 U.S. 937 (1998). Remarkably, the petition for certiorari not only fails to acknowledge that certiorari was denied on this issue in the *Home Builders* case, but even omits "*cert. denied*" in its citation to *Home Builders* both in the text of the petition and in the table of cases. *See* Pet. v, 18-19, 20.

There is even less reason to grant certiorari on the constitutionality of the ESA's protections now than there was in *Home Builders*. Since the Court denied certiorari in

that case, it has provided additional guidance to the lower federal courts on Commerce Clause issues in its decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000), affirming the Fourth Circuit's application of the Commerce Clause to strike down the Violence Against Women Act in *Brzonkala v. Virginia Polytechnic Institute & State University*, 169 F.3d 820 (4th Cir. 1999) (en banc). The court below had the full benefit of this Court's reasoning in *Morrison* (as well as its own reasoning in *Brzonkala*, which this Court largely endorsed), and Chief Judge Wilkinson's opinion adheres conscientiously to the rules laid down in *Morrison* as well as its predecessor, *United States v. Lopez*, 514 U.S. 549 (1995).

Indeed, Chief Judge Wilkinson's legal analysis begins with the statement that "[w]e consider this case under the framework articulated by the Supreme Court in *United States v. Lopez* and *United States v. Morrison*." Pet. App. 9a (citations omitted). The opinion goes on to cite *Morrison* and *Lopez* repeatedly en route to the conclusion that "[u]nlike the statutes in *Lopez* and *Brzonkala* [*Morrison*], [the red wolf regulation] can be upheld while observing principled limitations on federal power." *Id.* at 503.

Chief Judge Wilkinson's opinion represents the first federal judicial application of the principles of *Morrison* to the ESA, and, indeed, the first opinion applying *Morrison* to any federal statutory scheme. The petitioners cite no post-*Morrison* decision of any court that conflicts with the decision below either in its holding or on some pertinent point of principle. Unless and until some actual disagreement develops among the federal courts about the application of *Morrison* to the ESA or some closely analogous federal law, there is no need for this Court to intervene in this area so soon after laying out the governing principles in *Morrison*.

Of course, the only post-*Morrison* "disagreement" the petitioners cite is Judge Luttig's solitary dissent—which did not even persuade a single Fourth Circuit judge to vote to

rehear this case en banc. If, as petitioners suggest, a dissent in a court of appeals decision were enough to establish a "conflict warrant[ing] this Court's immediate attention" (Pet. 21), this Court's docket would require considerable expansion, to say the least.

Judge Luttig's disagreement with Chief Judge Wilkinson's Commerce Clause analysis is a particularly unpersuasive reason for granting certiorari in this case in light of his simultaneous acknowledgment that the federal government "plainly" may regulate the taking of red wolves in the experimental population under Congress' spending power and its power over federal lands. Pet. App. 53a. This concession—which draws support from the fact that the red wolves have been released onto federal lands by a federal agency using funds appropriated by Congress—renders Judge Luttig's disagreement with the majority's analysis a matter of academic interest only.

In any event, the petitioners' adoption of Judge Luttig's claim that Chief Judge Wilkinson and the rest of the Fourth Circuit have now "consigned" *Lopez* and *Morrison* "to aberration" (Pet. 21, quoting Pet. App. 51a (Luttig, J., dissenting)) is not remotely credible. The record of the Fourth Circuit hardly bears out the suggestion of the petitioners and the dissenting judge that the Commerce Clause and other limitations on federal power will henceforth be a dead letter in Virginia, West Virginia, Maryland and the Carolinas.

The Fourth Circuit's opinion in *Brzonkala*, after all, helped pioneer the approach taken by this Court in *Morrison*. Chief Judge Wilkinson joined in the en banc court's decision in *Brzonkala*, and hailed it as the reflection of a "jurisprudence [that] holds the promise to be an enduring and constructive one." *Brzonkala*, 169 F.3d at 893 (Wilkinson,

C.J., concurring).[2] The decision below shows no sign that Chief Judge Wilkinson has retreated from the views he expressed in *Brzonkala*.

Brzonkala, moreover, is only one of a spate of recent cases in which the Fourth Circuit has given expansive scope to federalism concerns and taken a skeptical and narrow approach to the scope of federal regulation. The Fourth Circuit, for example, anticipated almost precisely this Court's recent holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 2001 WL 15333, that the Corps of Engineers had overreached its authority to regulate "navigable waters" under the Clean Water Act. *See United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

Many other Fourth Circuit decisions similarly reflect what that court has called "the recent intensity with which the Supreme Court *and this circuit* have focused on issues of federalism, separation of powers, and a limited federal government." *Litman v. George Mason University*, 186 F.3d 544, 555 (4th Cir. 1999) (emphasis added), *cert. denied*, 120 S. Ct. 1220 (2000). *See, e.g., Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir.), *petition for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc); *cf. Brown & Williamson Tobacco*

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[2] Ironically, Judge Luttig's dissent below criticizes Chief Judge Wilkinson's statement in *Brzonkala* that *Lopez* and other recent decisions reflect a new "judicial activism" in support of federalism, without acknowledging that Chief Judge Wilkinson *endorsed* such activism as a reflection of legitimate constitutional principles. *Compare* Pet. App. 53a (Luttig, J., dissenting), *with Brzonkala*, 169 F.3d at 892-98 (Wilkinson, C.J., concurring).

Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

In short, the petitioners' report of the death of federalism in the Fourth Circuit is greatly exaggerated. Unless and until there develops either some genuine uncertainty in the lower courts about the application of this Court's Commerce Clause decisions to the ESA or some real reason to believe that this Court's precedents are not being conscientiously followed, there is no "immediate need" for the Court to address the issues resolved by the Fourth Circuit in this case.

II.

THE COURT'S RECENT DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. UNITED STATES ARMY CORPS OF ENGINEERS* PROVIDES NO SUPPORT FOR PETITIONERS' POSITION

Much of the petition for certiorari is devoted to arguing that the Court should hold this case pending its decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), No. 99-1178, and should grant certiorari, vacate, and remand if it were to reach the constitutional issue in that case. Both those requests are now moot: The Court has decided *SWANCC*, so there is no reason to hold this petition; and it has decided *SWANCC* without reaching any constitutional issue, so there is no basis for vacatur and remand.

Indeed, the Court's opinion in *SWANCC* only serves to underscore the irrelevance of that decision to the issues posed by this case. The holding of the Court in *SWANCC* is that the plain language of the Clean Water Act, authorizing the Army Corps of Engineer to regulate discharges of fill material into "navigable waters," does not extend to "nonnavigable, isolated, intrastate waters," and, thus, the Corps' regulation purporting to require permits for discharges into such

isolated, nonnavigable waters "exceeds the authority granted to [the Corps] under § 404(a) of the CWA." 2001 WL 15333, at *6, *9. The purely statutory issue that was actually resolved by the Court in *SWANCC* has no application in this case.

The Court did observe that its holding found support not only in the plain language of the statute but also in the principle of avoiding constructions of statutes and regulations that would raise "significant constitutional questions." *Id.*, 2001 WL 15333, at *8. The Court's invocation of this principle, however, provides no basis either for taking up this case or for returning it to the Fourth Circuit for further consideration, because even before *SWANCC*, the Fourth Circuit had already invoked precisely the same principle of construction to reach exactly the same result under the very same statute and regulation in *United States v. Wilson*, 133 F.3d at 256-57. In other words, the holding in *SWANCC* was already the law in the Fourth Circuit when that court upheld the red wolf regulation in this case, and the Fourth Circuit correctly saw no inconsistency between the two.

Indeed, this Court's discussion of the principle of constitutional avoidance in *SWANCC* only serves to emphasize the significant differences between that case and this one. Central to the Court's reasoning in *SWANCC* was that there it was an *agency*, operating without clear marching orders from Congress, that had "invoke[d] the outer limits of Congress' power." 2001 WL 15333, at *8. The Court emphasized its assumption that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *id.*, and hence the Court applied the rule that "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* (quoting *Edward J. DeBartolo Corp.*

v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

In this case, by contrast, there can be no doubt that Congress has itself authorized the administrative action in question. Although the petitioners characterize this case as an assault on a particular regulation, there is no dispute that the ESA expressly provides for prohibitions on the taking of endangered species such as the red wolf, expressly authorizes the establishment of experimental populations of such species to advance the statutory goal of restoring their numbers in the wild, and expressly provides for modification of the taking prohibition to permit takings of members of such experimental populations that would otherwise be illegal. If such measures approach the limits of the Commerce Power, it is Congress that has made the decision to go that far, not the agency.

Moreover, in upholding the expansive scope of the ESA's taking prohibition, this Court has already validated, as a matter of statutory interpretation, the type of sweeping regulatory construction of the statute that, according to the petitioners, raises a constitutional concern. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Nowhere in the *Sweet Home* decision—rendered only two months after *Lopez*—is there the slightest suggestion that a broad construction of the ESA's taking prohibition (indeed, a construction that represented a much more aggressive *agency* interpretation than anything at issue in this case) raised any constitutional questions concerning the scope of congressional authority. Read in light of the principles affirmed in *SWANCC*, the holding in *Sweet Home* suggests that the Court saw no significant constitutional question (other than the issues of fair notice discussed in the opinions) implicated by the ESA.

III.

THE FOURTH CIRCUIT'S DECISION IS CORRECT

A. The Commerce Clause Authorizes Regulation To Prevent Destruction Of The Nation's Endangered Wildlife

In any event, the petitioners' criticisms of the merits of the decision below are misplaced. The majority's holding that the red wolf regulation may be sustained under the Commerce Clause reflects a correct application of the principles laid down by this Court in *Morrison* and *Lopez*.

As Chief Judge Wilkinson recognized, "the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause"; however, "economic activity must be viewed in broad terms." Pet. App. 12a. Indeed, *Lopez* made clear that "economic activity" within the meaning of the Court's Commerce Clause cases encompasses not only facially commercial activities, but also activities "that arise out of or are connected with a commercial transaction." 514 U.S. at 561; *see also id.* at 573-74 (Kennedy, J., concurring) (recognizing the Court's "practical conception of commercial regulation").

Exploitation or destruction of the nation's valuable natural resources—including by "taking" endangered species—constitutes such economic activity. Destroying natural resources is "connected with" commercial transactions because it extinguishes the potential commercial benefits of such resources. Thus, in *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court affirmed Congress' power to regulate surface coal mining under the Commerce Clause based upon legislative findings that such mining "destroy[s] or diminish[es] the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes." 452 U.S. 264, 277-78

(1981) (quoting 30 U.S.C. § 1201(c)). The companion case of *Hodel v. Indiana* affirmed that Congress may act pursuant to the Commerce power to preserve the nation's prime farmland from destruction. 452 U.S. 314, 324-27 (1981). As Chief Judge Wilkinson's opinion properly recognized, these authorities establish "that protection of natural resources may require action from Congress." Pet. App. 36a.

The Commerce Clause power to preserve natural resources from destruction likewise authorizes the regulation at issue in this case. The ESA recognized and declared that imperiled species of wildlife constitute natural resources "of esthetic, ecological, educational, historical, recreational, and scientific value" to the nation. 16 U.S.C. § 1531(a)(5). Both the purposes and the design of the statute have "an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Congress intended the ESA to preserve "potential resources" of "incalculable" value. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178 (1978) (internal quotations and citation omitted). To protect and to restore these resources, Congress prohibited the taking of species deemed to be threatened with extinction and required federal agencies to use "all methods and procedures" to recover them so that both consumptive and non-consumptive commercial activity with respect to such species could be resumed. *See* 16 U.S.C. §§ 1538(a)(1)(B), (C); 1536(a)(1); 1532(3); *see also* Pet. App. 20a-21a.

The majority below properly concluded that the red wolf regulation serves the ESA's commercial purposes by applying the statute's taking prohibition (with numerous exceptions) to protect and to restore the only existing wild population of endangered red wolves. As Chief Judge Wilkinson observed—and as undisputed record evidence demonstrates—North Carolina's red wolves today are the subject of interstate tourism that has drawn many visitors from around the country, and scientific work that has drawn persons from around the world. *See* Pet. App. 16a-20a; C.A.

App. 840, 1261-1301. Chief Judge Wilkinson's analysis of the nexus between this interstate commerce and federal wolf protection measures reflects common sense: "with no red wolves, there will be no red wolf related tourism" and "no scientific research" related to the wolves. Pet. App. 15a-16a.

The petition for certiorari pays scant attention to the record evidence of commercial traffic associated with the wolves. Rather, it selectively condemns Chief Judge Wilkinson's additional observation that recovery of the wolf population could yield renewed commerce in wolf-related products. *See* Pet. 24-26. Yet there is nothing fanciful about the majority's well-documented conclusion that wolves have been, and continue to be, exploited for commercial products where they are sufficiently plentiful to make such traffic practicable. *See* Pet. App. 20a-21a, 40a.

In any event, it required no "exercise in speculation" for Chief Judge Wilkinson to find that the reintroduced red wolves have contributed to an active market in tourism and scientific study in eastern North Carolina. Pet. 25. Indeed, the record of commerce focused upon endangered wildlife is far stronger in this case than it was in the *Home Builders* case, which this Court already has determined did not warrant further review. Contrary to petitioners' argument, the existence of record evidence documenting interstate commerce associated with the very species at issue, in the very location where the challenged federal regulation applies, hardly makes this case "an ideal opportunity" for the Court to chart "the limits of the federal commerce power as regards wild animals." Pet. 24.

B. The ESA Does Not Intrude Into An Area Of Purely Local Concern

The petition ignores history and this Court's own jurisprudence in arguing that "[r]egulation of wild animals, including human interactions with animals on private

property, remains a matter of state concern that is outside the powers conferred on Congress." Pet. 28. Certainly, States play an integral role in regulating wildlife—a role that the ESA respects, *inter alia*, in its criteria for determining whether a species is endangered, *see* 16 U.S.C. § 1533(b)(1)(A) (requiring consideration of "those efforts, if any, being made by any State ... to protect such species"), in its directive that federal agencies administering the ESA "shall cooperate to the maximum extent practicable with the States," *id.* § 1535(a), and in its overriding purpose to recover imperiled wildlife species so that federal protections may be terminated and management of such species may revert to the States. *See id.* §§ 1531(b), 1532(3).

However, it is equally true—as the majority below recognized—that wildlife conservation "is an appropriate and well-recognized area of federal regulation." Pet. App. 34a. "The federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 702-12, the Bald Eagle Protection Act of 1940, 16 U.S.C. §§ 668-668d, and the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h, all charted the course for federal conservation of endangered wildlife that led to enactment of the ESA in 1973.

This Court's recognition of the federal role in wildlife conservation began with Justice Holmes' opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), and has never wavered. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (recognizing commerce power to protect migratory wildlife); *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265, 281-82 (1977) (regulation of fishing in state waters); *cf. Hughes v. Oklahoma*, 441 U.S. 322 (1979) (finding intrastate harvest of minnows within reach of dormant Commerce Clause).

The Court only recently reaffirmed the federal role in wildlife conservation. In *Minnesota v. Mille Lacs Band of*

Chippewa Indians, 526 U.S. 172, 204 (1999), the Court rejected an argument that Indian hunting and fishing rights conferred by a federal treaty conflicted irreconcilably with Minnesota's "sovereignty over the natural resources in the State." *Id.* at 204. The Court stated that "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Id.*

Thus, the red wolf regulation does not "intrude[] into an area of purely local concern," as petitioners contend. Pet. 26. Rather, as Chief Judge Wilkinson correctly concluded, "State control over wildlife ... is circumscribed by federal regulatory power." Pet. App. 31a.

C. The Petition Does Not Present The Narrow Challenge That Petitioners Suggest

The petitioners protest that their case "is not an attack on the entire scheme of federal environmental regulation." Pet. 28. But if, as petitioners suggest, this case really did present only a narrow challenge to a unique regulation governing a mere handful of animals in one small region of a single state, on a subject that Congress could regulate pursuant to its other enumerated powers even if the commerce power were unavailable, one wonders why this Court should bother with it at all.

In fact, however, the petition misstates both the scope and the import of its challenge. Although aimed at a specific regulatory application, this case effectively challenges the ESA's prohibition on "taking" all endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). Indeed, petitioners' challenge necessarily implicates the federal government's general authority to regulate takings of endangered species, for even

if the regulation at issue were invalidated, the taking of red wolves would remain illegal under the ESA.[3]

Of course, virtually any challenge to the application of the ESA to a particular species could be framed as involving only a "handful of animals," often existing in but "one small region of one state." Pet. 28 (quoting Pet. App. 52a (Luttig, J., dissenting)). By definition, endangered species are reduced in number and frequently also in geographic range. *See* 16 U.S.C. §§ 1532(6), 1533(a)(1)(A). Chief Judge Wilkinson aptly noted the perverse result that would flow from petitioners' argument: "the more endangered the species, the less authority Congress has to regulate the taking of it." Pet. App. 28a.

Such a view would have devastating results. If the federal government is without power to preserve the only population of red wolves existing in the wild, then it may be equally powerless to preserve the last population of any species that ventures off the federal lands. Yet the most accurate data available show that more than 90 percent of all species listed for protection under the ESA have some or all of their habitat on nonfederal lands. Pet. App. 38a. Holding the federal government powerless to protect endangered or threatened species on nonfederal lands would leave many species at severe risk of extinction, or else doomed to preservation only as zoo specimens. Chief Judge Wilkinson rightly concluded that nothing in the Constitution requires this result.

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[3] Section 10(j) of the ESA provides that "each member of an experimental population shall be treated as a threatened species." 16 U.S.C. § 1539(j)(2)(C). Absent a special regulation (such as the red wolf regulation) affording diminished protection to a threatened species, the ESA's general taking prohibition applies to members of a threatened species. *See* 50 C.F.R. § 17.31(a); *see also* 16 U.S.C. § 1533(d) ("The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [the taking prohibition].").

D. In Any Event, The Regulation And The ESA Are Valid Under The Treaty Power

In addition to being fully supported by the Commerce Clause, the red wolf regulation is valid as a necessary and proper measure to carry into effect the federal treaty power. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 2, cl. 2. The majority below did not address the treaty power because it deemed the regulation valid under the Commerce Clause. *See* Pet. App. 26a n.4. Nevertheless, the treaty power provides an alternative constitutional basis for the regulation.

This Court has recognized the treaty power as a basis for federal wildlife regulation on private lands since *Missouri v. Holland*, *supra*, where it sustained the Migratory Bird Treaty Act against a challenge virtually identical to that raised by the petitioners here. Writing for the Court, Justice Holmes stated, "[i]t is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could." 252 U.S. at 433.

As with the Migratory Bird Treaty Act, the ESA implements international treaty obligations. Congress in the ESA found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to" a number of listed treaties, 16 U.S.C. § 1531(a)(4), and enacted the ESA "to achieve the purposes" of those treaties. *Id.* § 1531(b). The most important of the listed treaties for this case is the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, United States-Other American Republics, 56 Stat. 1354, T.S. No. 981 (effective May 1, 1942). *See* 16 U.S.C. § 1531(a)(4)(C). The Convention promises protection of "all species and genera of ... native flora and fauna ... in sufficient numbers and over areas extensive enough to assure them from becoming

extinct through any agency within man's control." 56 Stat. at 1356. It also commits the contracting governments "to adopt, or to propose such adoption to their respective appropriate lawmaking bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries, but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves." *Id.* at 1362; *see Palila*, *supra*, 471 F. Supp. at 993 (relying on the Convention to support the ESA's prohibition on taking of Hawaiian bird species).

Promulgated under the authority of the ESA, the red wolf regulation constitutes a measure "for the protection and preservation of ... fauna within" the United States, "but not included in" any national wildlife reserve, within the meaning of the Convention. As Justice Holmes wrote in *Holland*, where such a valid treaty exists, "there can be no dispute about the validity of the statute under article I, Section 8, as a necessary and proper means to execute the powers of the government." 252 U.S. at 432. Accordingly, the red wolf regulation is constitutionally valid for this reason as well.

CONCLUSION

The petitioners present no legitimate reason for this Court to review the decision of the Fourth Circuit. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

50 C.F.R. § 17.84 Special rules—vertebrates

* * *

(c) Red wolf (Canis rufus).

(1) The red wolf populations identified in paragraphs (c)(9)(i) and (c)(9)(ii) of this section are nonessential experimental populations.

(2) No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations;

(4)(i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(ii) Any person may take red wolves found on lands owned or managed by Federal, State, or local government agencies in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is incidental to

lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others, and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident and that all such taking shall be reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer, as noted in paragraph (c)(6) of this section for investigation.

(v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned,

Provided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours to the Service project leader or biologist, the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(vi) The provisions of paragraphs (4)(i) through (v) of this section apply to red wolves found in areas outside the areas defined in paragraphs (c)(9)(i) and (ii) of this section, with the exception that reporting of taking or harassment to the refuge manager, Park superintendent, or State wildlife enforcement officer, while encouraged, is not required.

(5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study;

(iii) Take an animal that constitutes a demonstrable but non-immediate threat to human safety, or which is responsible for depredations to lawfully present domestic animals or other personal property, if it has not been possible to otherwise eliminate such depredation or loss of personal property, Provided That such taking must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge or Park;

(iv) Move an animal for genetic purposes.

(6) Any taking pursuant to paragraphs (c)(3) through (5) of this section must be immediately reported to either the Refuge Manager, Alligator River National Wildlife Refuge, Manteo, North Carolina, telephone 919/473-1131, or the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee, telephone 615/436-1294. Either of these persons will determine disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c)(2) through (7) of this section.

(9)(i) The Alligator River reintroduction site is within the historic range of the species in North Carolina, in Dare, Hyde, Tyrrell, and Washington Counties; because of its proximity and potential conservation value, Beaufort County is also included in the experimental population designation.

(ii) The red wolf also historically occurred on lands that now comprise the Great Smoky Mountains National Park. The Park encompasses properties within Haywood and Swain Counties in North Carolina, and Blount, Cocke, and Sevier Counties in Tennessee. Graham, Jackson, and Madison Counties in North Carolina, and Monroe County in Tennessee, are also included in the experimental designation because of the close proximity of these counties to the Park boundary.

(iii) Except for the three island propagation projects and these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the refuge or Park experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally using radio telemetry as appropriate. All animals released or captured will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be in need of special care or that moves onto lands where the landowner requests their removal will be recaptured, if possible, by Service and/or Park Service and/or designated State wildlife agency personnel and will be given appropriate care. Such animals will be released back into the wild as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the Alligator River National Wildlife Refuge project will be reevaluated by October 1, 1992, to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population. The duration of the first phase of the Park project is estimated to be 10 to 12 months. After that period, an assessment of the reintroduction potential of the Park for red wolves will be made. If a second phase of reintroduction is attempted, the duration of that phase will be better defined during the assessment. However, it is presently thought that a second phase would last for 3 years, after which time the red wolf would be treated as a resident species within the Park. Throughout these periods, the experimental and nonessential designation of the animals will remain in effect.